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Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation §
Securities, Derivative & § MDL-1446
"ERISA Litigation §
§

MARK NEWBY, ET AL., §
§
Plaintiffs §

VS. §

CIVIL ACTION NO. H-01-3624 ✓
CONSOLIDATED CASES

ENRON CORPORATION, ET AL., §
§
Defendants §

DAVID JOSE, JAMES BRISTER, §
PETER MAXFIELD AND GEORGE §
ATALLAH, §

Plaintiffs, §

VS. §

CIVIL ACTION NO. H-02-4243

ARTHUR ANDERSEN, ET AL., §
§
Defendants. §

ORDER OF REMAND

Pending before the Court in the above referenced Enron-related action, H-02-4243, removed from the 57th Judicial District Court of Bexar County, Texas to the San Antonio Division of the United States District Court for the Western District of Texas and transferred to this Court by order of the Multidistrict Litigation Panel, are *inter alia* Plaintiffs' motion to remand (instrument #4) and Defendants' motion to dismiss (instrument #44) on the grounds that the claims are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, codified as amended in part at 15 U.S.C. §§ 77p and 78bb(f) (1998) ("no covered class action based upon the statutory

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52

or common law of an State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security").

This action is another case filed by George M. Fleming and Gregory Sean Jez of Fleming & Associates, brought by plaintiffs individually in state court under Texas state law with fewer than fifty plaintiffs.

As was true of several others, this case does not technically satisfy SLUSA's definition of a "covered class action."¹

¹ Title 15 U.S.C. § 78bb(f)(5)(B) defines a "covered class action" as

- (i) any single lawsuit in which--
 - (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominated over any question affecting only individual persons or members or
 - (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
- (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--
 - (I) damages are sought on behalf of more than 50 persons; and
 - (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

Furthermore, in its recent ruling affirming this Court's injunction enjoining Sean Jez and the law firm from filing new state court actions relating to Enron without leave of court, the Fifth Circuit made clear that counsel's deliberate efforts to circumvent SLUSA and avoid federal jurisdiction by filing such suits in counties across Texas that did not meet SLUSA's definition "are not themselves an abuse of the courts." Newby v. Enron Corp., 302 F.3d 295, 302 (5th Cir. 2002), rehearing and rehearing en banc denied, 2002 WL 31115201 (2002). It further noted that

the district court cannot predicate future denials of leave [to file state court actions related to Enron] solely upon Fleming's desire to avoid the reach of the Securities Litigation Uniform Standards Act. We do not question the filing of suits tailored to avoid federal jurisdiction. Nor do we countenance any preemptive federal dominion. The parallel exercise of state and federal judicial power is inherent in our government of dual sovereignty.

Id. at 303.

Accordingly, the Court

ORDERS that Plaintiffs' motion to remand is GRANTED for lack of subject matter jurisdiction and H-02-4243 is REMANDED to the 57th Judicial District Court of Bexar County, Texas. Because SLUSA does not preempt the claims asserted herein, Defendants' motion to dismiss is MOOT.

Finally, as this Court indicated in its Memorandum and Order entered on May 1, 2002 in *Newby*, H-01-3624 (#577 at 4-6), SLUSA provides for a stay of discovery in any private action in

state court where the state court proceedings are being employed to circumvent the discovery stay of the PSLRA. 15 U.S.C. § 78u-4(b)(3)(D). As it has in other cases remanded on the same grounds, in aid of its jurisdiction and to protect and effectuate its judgments in Newby the Court

ORDERS that all discovery in the instant remanded case is ENJOINED until this Court has ruled on the motions to dismiss in Newby.

SIGNED at Houston, Texas, this 21st day of November, 2002.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE